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No. 94-73

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oklahoma Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Oklahoma Supreme Court's decision to deny recusal of an allegedly biased commissioner in a pending ratemaking proceeding is ripe for review;

AND, if this Court determines this case is ripe --

2. Whether, under the facts of this case,* the procedures suggested by the Oklahoma court** to deal with the state constitutional strictures satisfies federal due process concerns.

* This case is a civil proceeding where (a) actual bias concerning the merits of the case has not been demonstrated, (b) the alleged bias is not pecuniary, but stems directly from purportedly unlawful and unethical actions taken by persons representing the entity seeking recusal, (c) senior representatives of that entity were informed by the allegedly biased commissioner of these actions in 1990 and of the pending FBI probe in 1991, and did not seek recusal until late 1992 -- acting only when the commissioner publicly announced his cooperation with the FBI probe of, inter alia, the unethical actions, (d) the state supreme court lacks authority to replace the commissioner and his presence will be necessary to conclude proceedings, if, at the end of the proceedings, the two other commissioners deadlock on any issue, and (e) no allegations of bias have been made against the two remaining commissioners.

** If disappointed with the commission's disposition of the pending proceedings, the entity has an opportunity to challenge the action on appeal under a heightened standard. If a violation of constitutional rights is asserted, the review includes an independent review of the law and facts as to, inter alia, whether the order is confiscatory or the utility was denied the right to make a fair presentation.

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SOUTHWESTERN BELL TELEPHONE COMPANY,
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On Petition for a Writ of Certiorari to the Supreme Court of Oklahoma

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The National Association of Regulatory Utility Commissioners (NARUC) is a quasi-governmental nonprofit organization founded in 1889. NARUC, which Congress calls "the national organization of the State commissions", 47 U.S.C.A. §410(c) (1971), presents the collective interest of State commissions charged with regulating the rates and conditions of service of electric, natural gas and telephone utilities operating within their respective jurisdictions. Both

Congress and the federal courts have long recognized that NARUC is a proper party to represent the collective interest of State regulatory commissions.[1]

NARUC's member commissions, which includes the Oklahoma Corporation Commission (OCC), are obligated under State law to ensure that the rates charged to retail consumers are just and reasonable. NARUC's mission is to serve the public interest by seeking to improve the quality and effectiveness of public utility regulation in America.

NARUC submits this brief as *amicus curiae* [2] in support of the OCC -- respondents to the petition for certiorari filed by Southwestern Bell Telephone Company (SWB) -- because of the deleterious impact upon the ability of State regulatory commissions to effectively scrutinize and regulate

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[1] See, e.g., *U.S. v. Southern Motor Carrier Rate Conference, et al.*, 471 U.S. 48, 53 (1985) at 10, "[t]hroughout this litigation, the NARUC has represented the interests of the Public Service Commissions..."; *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976); *U.S. v. Western Electric Co., et al.*, 569 F.Supp. 1057 (D.C. D.C. 1983) at note 17; *National Association of Regulatory Utility Commissioners v. FCC*, 423 U.S. 836, (1975).

[2] Pursuant to Rule 37.2, U.S. Supr.Ct. Rule 37, 28 U.S.C.A. (1994), NARUC has obtained the consent of the parties to the filing of this brief. Copies of the letters of consent have already been filed with the Clerk of the Court.

utilities that could potentially ensue should this Court chose to review and ultimately reverse the decision below.

STATEMENT OF THE CASE

The OCC derives its authority directly from the Oklahoma Constitution and is subject to the direct and exclusive appellate jurisdiction of the Oklahoma Supreme Court. In October 1992, Robert Anthony, one of three popularly elected OCC commissioners, announced that he had been cooperating as a witness in an Federal Bureau of Investigation probe of the agency since 1988. According to his statement, industry representatives paid him thousands in cash, usually in the guise of purported "campaign contributions", in exchange for influence. Where cash was received, the FBI received the funds immediately. Mr. Anthony's statement came six weeks after an August 1992 $93.7 million rate reduction and $183 million refund order, in OCC Docket PUD-260, directed to the regulated entity most heavily implicated in the 1989 "cash for votes" scheme -- telecommunications giant SWB.

Although in 1990, well in advance of his announcement, Mr. Anthony advised a SWB senior corporate officer of improper conduct by SWB spokesmen, and, in 1991, discussed the "ongoing FBI investigation" with a SWB

corporate attorney -- no recusal action in the PUD-260 docket was sought until he publicly announced his cooperation in the FBI investigation. As issues related to the source of cash delivered to Mr. Anthony and the potential culpability of other actors are currently pending in other forums, at note 1, page 3, of its petition, SWB proffers "for the record" its "position" that no "impropriety" was "authorized or attributable" to it.

SWB appealed the October 1992 PUD-260 order. The appeal resulted in a remand of several issues. In November 1992, SWB filed an original action with the Oklahoma Supreme Court seeking to recuse Mr. Anthony from the still pending PUD-260 proceedings, and all future SWB cases, citing his alleged bias. SWB's recusal actions resulted in two decisions. First, on May 23, 1993, the court disqualified Mr. Anthony from participating in the ongoing proceeding, but rejected a SWB request for a blanket recusal for future proceedings pending resolution of any federal criminal prosecutions. The OCC moved for rehearing suggesting that the decision was contrary to existing precedent construing the OCC's power as legislative under the state's constitution.

On April 14, 1994, the court granted the OCC request and held that it is unable to recuse Mr. Anthony through the SWB writ action. The opinion found that, in the context of the SWB rate proceeding, the OCC was exercising legislative

authority and that due process considerations requiring a neutral decision-maker did not attach. The court also contended that, regardless of how the proceeding is characterized -- quasi-judicial or legislative -- the "rule of necessity" will make it impossible for Mr. Anthony to be recused as (a) there is no Oklahoma constitutional or statutory authority to allow either the governor or the Supreme Court to replace a commissioner with the appearance of bias and (b) after the proceedings have been completed, without a third sitting commissioner, the two remaining commissioners might deadlock over individual issues or the entire proposed order.

The court also noted that any company challenging a commissioner for bias, regardless of how the proceeding is characterized, will still have a remedy via its ability to challenge the agency action on appeal under a heightened standard of judicial review -- a review which, under Oklahoma law -- includes an independent review of the law and facts if a violation of constitutional rights is asserted. SWB's writ asks this Court to reverse the April 1994 decision.

ARGUMENT

NARUC supports all of the arguments presented by the OCC in its Opposition. Mindful of Rule 37.1's admonishment, U.S. Supr.Ct. Rule 37.1, 28 U.S.C.A. (1994), NARUC seeks only to complement the OCC arguments with a brief discussion of related doctrines and relevant arguments.

I. THE PETITION IS NOT RIPE FOR REVIEW

The U.S. Constitution's Article III mandate limiting federal judicial power to "cases and controversies" requires a court to consider whether a case has matured or ripened into a controversy worth of adjudication before addressing its merits. This ripeness doctrine assures that federal courts do not decide purely abstract or theoretical claims, or render advisory opinions. The ripeness defense also often reflects prudential considerations.

In the leading case of *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967), this court defined the primary factors that determine if a case is ripe for review: the court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." NARUC contends that both the "hardship to the parties" criterion, and the "fitness" factor are wrapped up in the open-ended posture of the case presented for review.

Indeed, a crucial factor in assessing whether an issue is "fit" for review under *Abbot*, is whether the agency's action is "final" in the sense that the agency has reached a definitive conclusion. Id. 387 U.S. at 149-50. Thus, in this regard, the Article III derived ripeness doctrine significantly overlaps the statutory "finality" mandate found in 28 U.S.C. § 1257(1988). As the OCC exhaustively analyzed this statutory "finality" requirement in its Opposition - finding that, under the tests enunciated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Oklahoma court's decision is not eligible for review under the finality doctrine -- NARUC will not replicate its efforts here. However, it is important to note that the PUD-260 proceeding has not been completed. Thus, even if we assume, arguendo, Commissioner Anthony is actually biased, SWB could still achieve the result it desires at the close of the OCC proceeding without implicating any constitutional concerns due to the presence of a majority (two) of "unbiased" commissioners. In any case, other than the "routine" presentation of its case in chief, SWB is not required to make any additional efforts until completion of the OCC ratemaking proceedings. At that time, the action it is prematurely proffering for this Court's consideration will clearly have matured -- if it appears either (i) the OCC's final order is unreasonable or confiscatory, or (ii) if the OCC

procedure, i.e., allowing Mr. Anthony to participate, actually violates the requirements of fundamental fairness by denying SWB a proper opportunity to create a fair record during its presentation of its case. Moreover, as discussed below, even if constitutional issues do subsequently arise, SWB will have sufficient protection of its due process rights via the posited "heightened review" of both legal and factual issues before a completely unbiased body -- the Oklahoma Supreme Court.

II. IF THIS COURT FINDS THIS PROCEEDING RIPE FOR REVIEW, IT IS APPARENT THAT THE REMEDIES POSED, UNDER THE SPECIFIC FACTS OF THIS CASE, ACCORD SWB THE PROCESS THAT IS DUE.

It is axiomatic that, once the Court determines that a constitutionally protected liberty or property interest has, in fact, already been infringed upon and the case is thus ripe for review -- the next stage of a due process analysis is to decide exactly what procedural protections the U.S. Constitution requires.[3]

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[3] Federal and state cases like *Liteky v. United States*, 114 S. Ct. 1147 (1994), which require recusal on statutory grounds, often even when no actual bias is demonstrated, are not relevant to making this Constitutional analysis.

In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), this Court demonstrated its determination to retain flexibility in making these determinations, specifically noting that it would examine three factors to decide what due process requires in a given situation: "first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the...substitute procedural requirement would entail." [4]

The first stage of this analysis is not difficult. SWB's "private interest" is, of course, its capital infrastructure and its

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[4] Although initially, the Court used the *Mathews* test predominantly in cases involving government benefits, more recently, it has adopted this approach in a more tradition-bound area of administrative law -- coercive regulation of business. Cf. *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), where the test was used to decide the procedural rights of an employer ordered to reinstate an employee while the employee's allegations of retaliatory discharge was pending.

related ability to earn a return on its investment. Both will likely be significantly affected by the OCC "official action", i.e., final ratemaking order, regardless of whether any constitutional infringements actually occur.

The more difficult inquiry is assessing how that interest can possibly be placed at risk by the alleged bias of Commissioner Anthony. SWB has not even attempted to explain how Anthony's participation in OCC proceedings will violate its due process rights. It has merely waved the "neutral decision-maker" banner and pointed out certain facts - (i) SWB representatives made allegedly improper overtures to Mr. Anthony that included cash inducements, (ii) the FBI instigated an investigation of corruption at the OCC; and (iii) Mr. Anthony determined to cooperate with the federal authorities. These facts do not demonstrate any improprieties, other than those apparently committed by SWB. Nor do they demonstrate that Mr. Anthony is in any way biased against SWB in its pending rate case. Indeed, as SWB admits in its

petition, at 2, the only subsequent action related to these SWB contacts taken was a discovery request seeking "documents not related to any regulatory issues, but" to an "investigation of alleged corruption." {Emphasis Added}

As the request was not related to the merits of the pending PUD-260 proceeding, it was entirely proper. This Court has recognized that a single hearing officer or agency may be given a combination of investigative and adjudicative functions without implicating the 14th Amendment. Thus, a decision-maker can be charged with investigating and compiling facts in a case and making decisions based on those facts. See generally, *Withrow v. Larkin*, 421 U.S. 35 (1975); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Hortonville Joint School District v. Hortonville Education Association*, 426 U.S. 482 (1976), Rotunda, *The Combination of Functions in Administrative Actions*, 40 Ford.L.Rev. 101 (1971). Certainly, as an OCC Commissioner, Mr. Anthony has the option, if not the duty, to instigate investigations of corruption affecting the

OCC's procedures.

An examination of the other cases cited by SWB and its allies is instructive. For example, Petitioner SWB suggests the remedy of "heightened review" posed by the Oklahoma Supreme court "is in conflict with this Court's precedents," SWB Petition at 11, and cites *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 113 S.Ct 2264, 2277 (1993), as "holding" that "[e]ven appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator." While the Court did make the quoted statement in dictum, the "holding" was a bit more specific -- finding that the "judge" in an enforcement setting, did not have to meet otherwise applicable standards of neutrality if, as in the instant case, a neutral decision-maker was subsequently available to conduct a *de novo* review of all factual and legal issues.

SWB's argument also ignores those federal cases, it and its supporting amici cite, where a subsequent second

hearing by a separate and "unbiased" decision-maker was deemed adequate to correct due process violations. See, e.g., *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (1970), vacating an FTC order because of the participation of a clearly biased commissioner and requiring a second hearing before a differently constituted "decision-maker"; *Jarrott v. Scrivener*, 225 F.Supp 827 (D.C.D.C. 1964), finding improper bias on the part of the majority of a five member board and requiring a second hearing before a different decision-maker; *National Labor Relations Board v. Phelps*, 136 F.2d 562 (5th Cir. 1943) where the court found clear evidence of bias on the part of a single presiding Administrative Law Judge and vacated an NLRB order based on that judge's decision for a second hearing before a different decision-maker.

In any case, the only cases SWB cites where this Court has required both (a) a neutral decision-maker in the first instance AND (b) suggested that a subsequent review de novo

might be inadequate to cure due process concerns have a very restricted factual context. In each case, the decision-makers have had either a direct monetary interest in the outcome or they were professional competitors of the individuals seeking a ruling. See, SWB Petition at 4 & 11; citing, *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); which cites both *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972) and *Tumey v. Ohio*, 273 U.S. 510 (1927) [5] as supporting a finding that "...those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes" and extending that interest to encompass a Board of Optometrists disqualifying competitors.

In all these cases, unlike the case on review, the purported bias was directly connected to the merits of the matter submitted to the decision-maker. The *Cinderella* case, 425 F.2d 583 (1970), illustrates the point. There, the FTC

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[5] Both *Ward* and *Tumey* are cases where a single judge enforcing criminal fines against individuals had a direct financial interest in the collection of those fines.

order was vacated because of possible influence of one commissioner upon the other four commissioners at the agency. The focal point of the decision was a finding of actual bias on the part of the subject commissioner. More specifically, in that case, the "biased" commissioner was found to have basically prejudged the merits of the case. As it appears no evidence has been presented showing any actual bias by Commissioner Anthony concerning the merits of the pending PUD-260 proceedings, NARUC respectfully suggests that the procedures outlined by the Oklahoma court are adequate to protect SWB's rights.

Finally, the *Mathews* test instructs the Court to examine the probable value of the proposed safeguard -- in this case -- requiring the recusal of Mr. Anthony -- and the Government's interest, including the function involved and the fiscal and administrative burdens that the substitute procedural requirement would entail. As the decision on review notes, there is no provision for the appointment of a pro tempore

commissioner to substitute for a biased commissioner. If Mr. Anthony is recused and the remaining two commissioners deadlock on any aspect of the decision, it would appear that certain aspects of the case presentations will have to be reargued and/or resubmitted before Mr. Anthony to allow him to break the deadlock. This would unnecessarily burden the OCC staff. Moreover, even if one discounts NARUC's arguments concerning the impact of Mr. Anthony's alleged bias on the proceeding, the presence of a majority of "unbiased" commissioners participating in the OCC deliberations, in tandem with the subsequent availability of a remedial "heightened review" before the Oklahoma Supreme Court as discussed earlier, assures that SWB's rights will be adequately protected.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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